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### **Analysis of Enrolled Senate Bill 785**

**Topic:** Child Protection Registry  
**Sponsor:** Senator Bishop  
**Co-Sponsors:** None  
**Committee:** Senate Technology & Energy  
House Energy & Technology

**Date Introduced:** September 29, 2005

**Date Enrolled:** December 13, 2005

**Date of Analysis:** December 14, 2005

**Position:** The Department of Labor & Economic Growth opposes the bill.

### **Problem/Background:**

Public Act 241 of 2004 established the Michigan Children's Protection Registry. The Registry was created to provide parents and others responsible for minor children with a tool to protect them from exposure to inappropriate adult materials that are disseminated through electronic or wireless media.

There is some uncertainty among marketers/senders of adult materials about who is covered by PA 241 of 2004. Many senders would prefer not to be covered by the requirements of the Act because there is a cost to comply with it. Some companies who are presently covered by the Act argue that they should be exempted if they engage in certain screening activities of their own design.

In addition, some parties have expressed concerns about the security of the Registry and the potential ability of senders complying with the Act to derive a list of the contact points (addresses accessible to children) contained in the Registry.

### **Description of Bill:**

The bill clarifies that the intent of the Act is to protect children from receiving messages regarding at least the following topics: tobacco, alcohol, pornography, gambling and illegal drugs. The bill stops short of comprehensively enumerating all covered categories. (For example, in an internal memorandum dated September 30, 2005, the Attorney General has indicated that firearms and fireworks would also be covered.)

The bill provides an exemption from the Act for senders of otherwise prohibited electronic mail messages, if they obtain the written consent of an “age-verified adult” to receive a message at a “designated contact point” or e-mail address. Senders must validate the age of the adult who is authorizing receipt of a message at the designated email address through a face-to-face viewing of a “valid government-issued photo identification”. The sender must also obtain a written and signed consent to receive the otherwise prohibited message and make it available for verification by the Department. The messages sent pursuant to this subsection of the Act must notify the recipient that s/he may rescind the consent to receive the messages and provide an opportunity for the recipient to opt out of receiving future messages. Finally, the sender must notify the Department that it intends to send messages pursuant to this subsection. The Department is authorized to implement procedures to verify that a sender is in compliance with Section 5 (6).

The bill requires the Department, or the vendor under contract to the Department, to conduct a third-party audit to certify the security of the registry within 90 days of the effective date of the amendatory act and at least once a year thereafter. If the security audit determines that the registry does not meet or exceed the industry standard for high security systems the registry is required to be suspended until the systems are determined to meet the standard.

## **Summary of Arguments**

### **Pro:**

(1) The bill will help clarify the intent of the Act by explicitly naming certain covered industries. A similar program in Utah has been challenged on constitutional grounds. The intent statement in this bill may be helpful to the Attorney General in defending Michigan’s law if there is a similar challenge here.

(2) The bill is responsive to arguments of certain covered senders that there should be a way for them to obtain exemption from coverage by the Act.

(3) The third-party audit will help enhance the security of the Registry. The third-party audit is essential to assure that purveyors of obscene messages directed at children do not use the registry to create a targeted list of addresses to which children have access. Many spammers use programs that make up large numbers of e-mail addresses, the vast majority of which turn out to be not deliverable because the characters don’t match a real e-mail address. The registry’s list would be a gold mine compared to a list compiled in that manner.

The tobacco industry, specifically U. S. Tobacco Company (represented by Public Affairs Associates) is the only known supporter of the bill. Miller Brewing Company attempted to obtain an amendment relating to a slightly different method used by that company to create its mailing lists.

### **Con:**

(1) The clarification of intent may be more helpful to the lay reader than the legal community. It does not go far enough to definitively head off legal challenges that may be forthcoming. That being the case, the benefits of the clarification fail to outweigh the costs of the other provisions in the bill.

(2) The bill codifies as an exemption process, a model that is reportedly routinely used by at least one major company in the tobacco industry. The exemption process contained in the bill, while it accommodates those who already use it as a marketing mechanism, could be characterized as burdensome and potentially discriminatory against those industries for whom it is not a realistic option.

The exemption process in the bill will create confusion among the registrants and complicate both program administration and the enforcement process. Although an adult may authorize certain messages, the registered contact point to which the messages are sent may well be one to which children have access. To the extent that adult children share electronic addresses with their minor siblings (and sign up to receive adult-content messages at that address), this bill creates a loophole that will allow objectionable messages to be seen by some children in contravention of their parents' wishes. Verifying and investigating complaints that arise from the confusion this may create will require additional administrative and enforcement resources.

Participation in the Protect MI Child Registry is entirely voluntary on the part of registrants. People who want to receive prohibited messages can do so by simply NOT registering a contact point with the Registry. Parents who want to receive adult content messages while simultaneously shielding their children from them, need only set up separate contact points for each purpose and register only the address to which children have access. Adults should have no problem receiving desired adult-content messages at addresses of their choice without the creation of the exemption process contained in the bill. As a result, sender arguments that PA 241 of 2004 impedes adults from receiving messages they want to receive are not persuasive.

Therefore, the bill exemption creates a benefit for only a small portion of the marketer/sender community while increasing the complexity and cost of program administration and enforcement.

(3) Annual third-party security audits are already required under the contract between the State of Michigan and the program vendor. Consequently, the bill requirement for third party security audits is unnecessary.

Opponents of the bill included senders who can not easily meet the exemption criteria or who use a screening process that would not qualify for the exemption (e.g. Miller Brewing Company). Opponents also included those who opposed the Registry entirely based on concerns about the security of contact point information contained in the Registry (e.g. Email Sender and Provider Coalition--AKA Email Service Providers Coalition).

## **Fiscal/Economic Impact**

**(a) Department**

**Budgetary:** The bill does not have a direct budgetary impact. However, there will be costs related to verifying that a sender who claims the exemption is in compliance with statutory requirements. Depending on how many companies claim the exemption, these costs could be significant.

**Revenue:** The bill will decrease program revenues to the extent that senders take advantage of the exemption opportunity it offers.

**Comments:** The State receives a percentage of the revenues collected from sender access fees. By statute, these revenues are divided between the Department and the office of the Attorney General. Initial program revenues are lower than anticipated. If revenues remain at this level, the program will not be self-sustaining.

#### **(b) State**

**Budgetary:** The bill will not have an immediate budgetary impact on the state.

**Revenue:** The bill will decrease state revenues in proportion to the decrease in overall program revenues attributable to the avoidance of registry access fees by senders who exercise the exemption provision.

**Comments:** The tobacco industry is expected to be the primary beneficiary of the exemption language in the bill. It is difficult to assess the magnitude of the revenue impact since they appear to be deferring compliance with the Act thus far.

#### **(c) Local Government**

**Comments:** The bill should not affect local governments.

**Other State Departments:** The Office of the Attorney General may experience increased costs for complaint investigation and enforcement due to the complexity added by the exemption provision. The Departments of Information Technology and Management and Budget may be involved if a contract amendment is required related to the third-party security audit.

**Any Other Pertinent Information:** On November 17, 2005, the Free Speech Coalition, a trade association for the adult entertainment industry, filed suit in the United States District Court in Utah challenging the Utah law that mandated the creation of the Utah Children's Protection Registry (CPR Act). The Utah law is very similar to PA 241. The lawsuit seeks to prevent enforcement of the act against members of the Free Speech Coalition, and asserts the following declarations:

1. The CPR Act is pre-empted by federal law (The CAN-SPAM Act).
2. It violates the Commerce Clause of the United States Constitution for the following reasons:

- a. It impermissibly regulates protected speech of plaintiffs and its members outside the borders of Utah;
  - b. It imposes community standards and regulations of Utah on the Plaintiff and its members and e-mail recipients nationwide;
  - c. It subjects Plaintiffs, members, and other e-marketers to inconsistent e-mail regulations among the various states;
  - d. It unreasonably increases the costs of conducting interstate commerce for plaintiffs, its members, and other e-marketers.
3. CPR Act violates the 1<sup>st</sup> and 14<sup>th</sup> Amendment (Free Speech Provision) of the United States Constitution because:
  - a. It is an unlawful prior restraint on expressive activities of plaintiff, members, and other e-marketers;
  - b. It prohibits truthful and non-misleading commercial speech;
  - c. It is vague and overbroad;
  - d. It violates Article I Section 15 (Free Speech provision) of the Utah Constitution for the same reasons as the 1<sup>st</sup> Amendment of the US Const.
4. CPR Act violates the Utah Equal protection of Plaintiffs in comparison to other marketers.

The Plaintiffs are seeking a temporary restraining order, preliminary, and permanent injunction as well as a declaration from the US District Court for the Central Division of Utah that the CPR Act is unconstitutional.

**Administrative Rules Impact:** This bill may have administrative rules implications.